Supreme Court, U.S.
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CLERK

No. 98-1743

IN THE

Supreme Court of the United States

MCM PARTNERS, INC.,

Petitioner,

v.

ANDREWS - BARTLETT & ASSOCIATES, INC., d/b/a ANDREWS - BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON and GES EXPOSITION SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court below correctly affirmed summary judgment on Petitioner's antitrust and RICO claims, which were based on conduct predating a valid and enforceable Release between the parties, where Petitioner failed to offer admissible evidence that Respondents did anything that violated the antitrust laws or RICO after the effective date of the Release.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Viad Corp. is publicly-traded over the New York Stock Exchange and is the parent company of Respondent GES Exposition Services, Inc. ("GES") and directly or indirectly owns greater than 10% of its stock. Respondent Andrews Bartlett & Associates, Inc. is a wholly owned subsidiary of GES.

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STATEMENT OF THE CASE

A. Procedural Background

This appeal concerns claims Petitioner MCM Partners, Inc. ("MCM") brought against Respondents Andrews-Bartlett & Associates, Inc. ("AB"), Harold O. Bartlett ("Bartlett"), Bonnie Aaron ("Aaron"), and GES Exposition Services, Inc. ("GES"). The claims were based upon an alleged April 1992 conspiracy between Respondents and certain other individuals. The conspiracy allegedly had the effect of excluding MCM from the business of renting equipment at a trade show and convention facility located in Chicago, Illinois in violation of federal antitrust laws and RICO.

1. The Parties

MCM and the Respondents are not competitors. To the contrary, MCM filed this action to recover in excess of $4 million dollars from two of its best customers — AB and GES. AB was a nationwide exhibition contractor that produced trade shows and conventions at McCormick Place in Chicago and other locations. In 1994, AB merged with GES. Prior to the merger, Bartlett served as AB's President; Aaron was a shareholder and employee. After the merger, Bartlett and Aaron served as employees of GES. In conducting business in the Chicago area, AB and GES rented forklifts and other material handling equipment from a variety of suppliers.

MCM supplied material handling and personnel moving equipment to trade show contractors at McCormick Place. MCM did not own its own equipment, but instead served

as a broker, providing its customers with equipment it rented from National Lift Truck. MCM's sole shareholder, officer, and employee was Frank Mugnolo. Terrence Jordan ("Jordan"), MCM's attorney in this action and in prior actions, worked as a commissioned sales person for MCM.

One of MCM's competitors was O.G. Services, Inc. ("OG"), which supplied material handling and personnel moving equipment for trade shows and conventions at McCormick Place and other locations. OG owned most of the equipment it provided, although it occasionally rented additional equipment to fill large orders.

2. The Alleged Conspiracy

On April 17, 1992, Bartlett met with Nick Boscarino ("Boscarino"), who was affiliated with OG, for the first and only time. At the meeting, Boscarino agreed on behalf of OG that, if AB rented equipment solely from OG in 1992, OG would repay to AB at the end of the year 10 percent of OG's billings for equipment. By letter dated April 17, 1992, AB canceled two purchase orders previously issued to MCM for part of AB's equipment needs at two upcoming shows, the Food Marketing Institute ("FMI") and National Restaurant Association ("NRA") trade shows, which had been scheduled to be held at McCormick Place in May 1992 (the "Purchase Orders").

3. The First Lawsuit and the "Release"

Five days after receiving the cancellation letter, MCM sued OG, Boscarino, and others — but not AB, Bartlett, Aaron, or GES — alleging they violated RICO by conspiring to exclude MCM as a competitor in the rental equipment

market at McCormick Place and tortiously inferred with MCM's business. *MCM Partners, Inc. v. Nick Boscarino, et al.*, 92 C 2621 (N.D. Ill). On April 24, 1992, a hearing was held on MCM's motion for preliminary injunction. Jordan, as an authorized agent of MCM and MCM's attorney, testified at the hearing. During the hearing, an agreement was reached to resolve the claims in the action, and MCM dismissed its case.

Subsequently, on or about May 5, 1992, MCM and AB executed a Settlement Agreement and Release (the "Release"). Jordan was authorized to and did sign the Release on behalf of MCM. Bartlett signed the Release on behalf of AB. Both parties were represented by counsel.

Pursuant to the terms of the Release, AB agreed to perform under the Purchase Orders. In exchange, MCM agreed to release AB, its officers, its employees, successors, and other related parties from any and all claims arising from any matters occurring before April 25, 1992, including those alleged in the Complaint in the first lawsuit, as well as those relating to the Purchase Orders and the April 17, 1992 cancellation letter to MCM. Paragraph 5 of the Release provides, in pertinent part, as follows:

> . . . M.C.M. . . . hereby releases and forever discharges Andrews-Bartlett . . . from any and all claims, controversies, actions, demands, causes of action, debts, obligations, damages, liabilities, duties, contracts or insurance policies of every kind and description, whether known or unknown, and whether at law or in equity, which M.C.M. now has, has had, or hereafter may have against [Andrews-Bartlett] *arising out*

> *of any matter, cause or thing from the beginning of the world to April 25, 1992. . . .*

(Release, ¶ 5) (emphasis added).[1]

AB and MCM performed pursuant to the Purchase Orders. AB rented equipment from MCM for the FMI and NRA shows and paid the rental charges on all of it. In fact, AB's total payment to MCM for the FMI and NRA shows was approximately $160,000 — nearly $50,000 more than the amount set forth in the Purchase Orders. Although MCM did not solicit AB's business in 1993, GES rented from MCM in 1994 and continuing through 1996. (*MCM Partners, Inc. v. Andrews-Bartlett, Inc.*, No. 92 C 5641, slip op. at 16-17 (N.D. Ill. May 29, 1997); App. at 30).

Nearly four months after settling and dismissing the first lawsuit, MCM filed a second lawsuit based upon the alleged April 17, 1992 conspiracy — this time against the Respondents, OG, Boscarino, and others. In its Complaint, MCM alleged violations of RICO (18 U.S.C. §§ 1962(c) and (d)), the Sherman Act (15 U.S.C. §§ 1 and 2) and the Clayton Act (15 U.S.C. §§ 14, 18, and 24). MCM subsequently filed a Second Amended Complaint, which the Respondents and other defendants moved to dismiss. The District Court granted those motions, and MCM appealed the decision to the Seventh Circuit. The Seventh Circuit reversed the District Court's dismissal, in part, holding only that MCM's remaining claims had been adequately pleaded, not that they could be proven. *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 981 (7th Cir. 1995).

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1. On its face, the Release does not apply to conduct or acts by the Respondents that occur after April 25, 1992.

Discovery commenced upon remand, and MCM amended its Complaint several times to: (1) withdraw claims under the Clayton Act, 15 U.S.C. §§ 18, and 24; (2) add a count based upon alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §§ 505/1 *et seq.*; and (3) to conform its allegations to changes in facts and the identities of parties, including the addition of GES as a defendant.

On February 19, 1997, Respondents filed a motion for summary judgment arguing that, as a matter of law, the Release barred MCM's claims and, alternatively, that MCM lacked evidence to support its antitrust, RICO, and state law claims. In response to the motion for summary judgment, MCM set forth several fact-based arguments challenging the validity and enforceability of the Release. MCM's arguments were based upon evidentiary materials attached to the brief. MCM argued that the Release lacked consideration because AB failed to live up to a promise to permit MCM to compete fairly for future business. (*MCM Partners, Inc. v. Andrews-Bartlett Associates, Inc.*, No. 92 C 5641, slip op. at 20 (N.D. Ill. May 29, 1997); App. at 34). In addition, MCM argued that the terms of the Release violated public policy because they released future antitrust and RICO claims. (*Id.* at 21; App. at 36).

On May 28, 1997, the District Court granted Respondents summary judgment. The District Court ruled that much of the evidence MCM offered was inadmissible under the Federal Rules of Evidence and had been offered in a way that did not comply with the Federal Rules of Civil Procedure. (*Id.* at 2-6; App. at 13-17). The District Court rejected MCM's substantive arguments and dismissed MCM's claims. The Court held that the Release was valid

and enforceable and barred MCM's claims based upon pre-Release conduct. (*Id.* at 21; App. at 35-36). In addition, the District Court rejected MCM's argument that the Release violated public policy. According to the Court, MCM's substantive argument was "specious" because MCM's antitrust and RICO claims were based on AB's April 1992 conduct. (*Id.* at 21; App. at 36).

MCM subsequently appealed the District Court's decision to the Seventh Circuit, but not its evidentiary rulings. The Seventh Circuit affirmed the dismissal of MCM's claims and held that "MCM's claims based on pre-Release conduct [were] barred, and MCM fail[ed] to present any evidence of post-Release violations." (*MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 161 F.3d 443, 449 (7th Cir. 1998); App. at 10). On January 28, 1999, MCM filed a petition for rehearing *en banc*, which the Seventh Circuit denied. (App. at 47-48).

REASONS FOR DENYING THE WRIT

There is absolutely no reason for this Court to exercise its discretion to review this case. The Seventh Circuit's decision is merely that the Release bars Petitioner's antitrust and RICO claims grounded on events that occurred before the Release. There is nothing remarkable about that holding or the lower court's analysis. They are consistent with the decisions of this Court and other courts of appeal, and none of the cases Petitioner cites demonstrates otherwise. The notion that the lower court's decision somehow offends public policy is wholly unfounded, since it has no application to future antitrust or RICO violations.

I.

NEITHER THE RELEASE NOR THE DECISION BELOW ENFORCING THE RELEASE VIOLATES PUBLIC POLICY

A. The Release Is Enforceable And Does Not Bar Claims For Future Conduct — Only Claims Based Upon Conduct That Occurred Before April 24, 1992.

The Release does not bar claims for future antitrust or RICO violations. Nor does the Seventh Circuit's ruling have that effect. On its face, the Release applies to Respondents' conduct that occurred before April 25, 1992. As set forth in the Release, MCM discharged AB from claims "*arising out of any matter, cause or thing from the beginning of the world to April 25, 1992.*" (Release, ¶ 5) (emphasis added). Under Illinois law, a release of all claims that a party has "on account of any matter, cause or thing, whatsoever, from the beginning of the world" to a date certain bars that party from making claims against the released party based upon acts that occurred before the release. *Murphy v. S.M. Delaware, Inc.*, 95 Ill. App. 3d 562, 565-66, 420 N.E.2d 456, 459-60 (1981). The application of this rule to this case means that MCM released the Respondents from any claims — including antitrust and RICO claims — based upon conduct that occurred before April 25, 1992. Accordingly, because the Release does not bar claims based upon post-Release violations, the Seventh Circuit's decision was proper, and the Petition should be denied.

B. The Seventh Circuit's Decision Does Not Violate Public Policy.

Contrary to MCM's claims, the Seventh Circuit's decision does not apply the Release to discharge Respondents from liability for post-Release conduct. Nor does the Seventh Circuit's decision encroach upon the prior decisions of other circuit and district courts. *See e.g. Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 895-98 (3rd Cir. 1975); *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); *Main Line Theaters, Inc. v. Paramount Pictures Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962); *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 568 F. Supp. 1096, 1099 (N.D. Ill. 1983); and *Marketing Assistance Plan v. Assoc. Milk Producers, Inc.*, 338 F. Supp. 1019 (D.C. Tex. 1972). Instead, the Seventh Circuit's dismissal of MCM's claims resulted because MCM failed to offer admissible evidence of actionable, post-Release conduct by Respondents. (App. at 9-10).

The Seventh Circuit properly and simply dealt with MCM's argument that the Release would operate to bar claims of a continuing conspiracy. After conducting its *de novo* review of the District Court's decision and analyzing the record in the light most favorable to MCM, the Seventh Circuit found that MCM not only had not *proven* a continuing conspiracy, but had failed utterly to "allege any facts which would establish a new agreement *or* even an affirmation of the 1992 agreement." (App. at 5, 9) (emphasis added). In other words, the "important federal question" MCM posits (Petition at 7) is a red herring. The Seventh Circuit correctly required, but found lacking, evidence of any post-Release conduct that could be actionable either as a new agreement or a continuation of a prior agreement.

Regardless of whether MCM alleged a new or continuing conspiracy, it had to present evidence of each element of a Section I claim. To state a claim under Section I, a plaintiff must establish "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *MCM Partners, Inc. v. Andrews-Bartlett, Inc.*, 62 F.3d 967, 972 n.7 (7th Cir. 1995), *quoting*, *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993). Clearly, without an actionable agreement upon which to base its Section I claims, MCM is unable to fulfill the basic Sherman Act Section I requirement of a "contract, combination or conspiracy." *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (a Section I claim requires concerted conduct by (an agreement between) more than one entity: i.e., "contract, combination . . . or conspiracy").

Thus, MCM's argument is properly seen as an effort to secure a right to sue for the future consequences of conduct that pre-dated the Release in which MCM unambiguously surrendered those claims. To allow MCM to proceed would render the Release at issue here, and any other effort to settle antitrust claims, meaningless.

C. MCM's Reliance Upon *Zenith* Is Misplaced.

MCM's resort to a statute of limitations analogy similarly is unavailing. (Petition at 8-10). MCM relies primarily on this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 410 U.S. 321 (1970). In *Zenith*, this Court held as follows:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits

> an act that injures a plaintiff's busine
> *the context of a continuing conspiracy* ss . . . *In*
> the antitrust laws, . . . each time a plo violate
> injured by an act of the defendants aaintiff is
> action accrues to him to recover the cause of
> caused by that act and that, as to those damages
> the statute of limitations runs flamages,
> commission of the act. rom the

Id. at 338 (emphasis added).

At most, *Zenith* simply stands for the pr
in order to have an antitrust claim, a plaint
two things (at least): (1) an illegal agreeme
injury it causes. So long as ascertainable
within the statute of limitations period, the p
to redress it.

opposition that,
ff must prove
nt; and (2) an
injury occurs
aintiff can sue

The *Zenith* holding is inapposite to M
for several reasons. First, unlike Zenith, M
present evidence of a continuing conspiracy.
The fundamental factual basis for the *Zenith*
absent here.

CM's Petition
MCM failed to
(App. at 5, 9).
holding is thus

Second, *Zenith* addressed the effec
limitations has on *when* a party could asser
on *an otherwise actionable* agreement. Here,
on which MCM bases its claims is *not* acti
released Respondents from any liability bas
purposes of assessing MCM's claims, th
agreement does not exist. Zenith had a
agreement and an injury suffered more than
it was made. MCM may have suffered an i
Release, but it lacks an actionable agreeme
to base a claim. This deficiency was fatal to

a statute of
claims based
the agreement
onable; MCM
d upon it. For
pre-Release
n actionable
our years after
jury after the
t upon which
MCM's claim.

This Court's treatment of other issues in *Zenith* plainly refutes MCM's present arguments. HRI, the antitrust defendant in *Zenith*, argued that Zenith's antitrust claim for damages, which accrued in 1959 through 1963, was barred by a release executed in 1957. The release, HRI argued, rendered Zenith unable to recover on its antitrust claim based on conspiratorial conduct occurring prior to the 1957 release — even for future damages caused by pre-release conspiratorial acts. This Court rejected HRI's argument because, while HRI's alleged co-conspirators were identified in the release as parties covered by the release, HRI was not. *Zenith*, 401 U.S. at 342-43. Accordingly, HRI was not entitled to the benefit of the release. *Id.* at 347-348.

Conspicuously absent from this Court's decision, however, is any suggestion that the release would have been ineffective as to HRI had HRI been a party to it. In fact, this Court clearly suggested that the release *was* effective as to HRI's alleged co-conspirators who were parties to it. 410 U.S. at 347-48. Here, there is no question that MCM is a party to the Release.

Absent an actionable agreement, *Zenith's* holding cannot provide any support for MCM's position. MCM tries to fill this void with, and bases its entire "public policy" argument on incantations of "continuing conspiracy." Yet the Seventh Circuit found nothing in the record to support such a claim. That ruling is amply supported by federal decisions. *See, e.g., Kaw Valley Elec. Co-op Co. v. Kansas Elec. Power Co-op, Inc.*, 872 F.2d 931 (10th Cir. 1989); *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981); *SJ Advanced Technology & Mfg. Corp. v. Junkunc*, 627 F. Supp. 572

(N.D. Ill. 1986); *Baker v. Chagrin Valley Medical Corp.*, 1985-1 Trade Cas. (CCH) ¶ 66,622 (N.D. Ohio 1985), *appeal dism'd*, 779 F.2d 49 (6th Cir. 1985).

D. The Seventh Circuit's Decision Dismissing MCM's RICO Claims Was Proper.

MCM also makes a half-hearted argument for reversal of summary judgment against it on its RICO claim. Summary judgment of that claim was mandated by, among other things, MCM's agreement to the Release. MCM's contention that RICO violations arose each time AB contracted with OG is unsupported by any statute, case law, or reason. (Petition at 10). Indeed, as the Seventh Circuit properly noted, so called "predicate acts" are just one of four elements of a RICO claim, and "[t]he facts in the record do not support a finding of a post-Release violation of RICO." (App. at 10). MCM gave up its antitrust and RICO claims based on pre-April 25, 1992 conduct when it executed the Release. MCM offered no evidence to establish that the elements of either claim existed after that date. MCM remains bound by the Release and this Court should not countenance MCM's efforts to ignore its contract.

CONCLUSION

The Seventh Circuit's decision affirming summary judgment in the Respondents' favor on MCM's antitrust and RICO claims was proper and in accordance with applicable law. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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